COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-463

COLONIAL AMERICAN CASUALTY AND SURETY COMPANY[1]

vs.

RALPH SEVINOR & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In these cross appeals, the defendants, Ralph and Meryl Sevinor (Sevinors), appeal from the judgments against them and challenge the orders denying their motions for reconsideration. The plaintiff, Colonial American Casualty and Surety Company (Colonial), appeals from the amended judgment awarding attorney's fees and calculating prejudgment interest. We affirm.

Discussion. 1. Summary judgment. We review de novo the allowance of a motion for summary judgment. See Dorrian v. LVNV Funding, LLC, 479 Mass. 265, 270 (2018). Where the appeal concerns cross motions for summary judgment, "[w]e ask whether

[1] Also known as Fidelity and Deposit Company of Maryland, also known as Zurich American Insurance Company, as successor-in-interest to The Mountbatten Surety Company, Inc.

[2] Meryl Sevinor.

the evidence, in the light most favorable to the party losing the contest of cross motions, and the controlling law entitle the prevailing party to judgment." Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of Am., Inc., 82 Mass. App. Ct. 461, 465 (2012).

The Sevinors argue that the bonds issued to Ralph Sevinor's now-defunct corporation, Capital Floors, Inc. (Capital Floors), were unenforceable because they failed to conform to the statutory scheme established in G. L. c. 149, governing bidding procedures for public construction projects. The judge allowed summary judgment after determining that the bonds were valid, reasoning that while the bonds included terms not included in G. L. c. 149, § 44F, concerning subcontractor bonding, those terms did not directly conflict with the statutory bond terms.

We affirm, but take a different approach. See Rasheed v. Commissioner of Correction, 446 Mass. 463, 478 (2006). Viewing the evidence in the light most favorable to the Sevinors, we assume, without deciding, that the bonds issued to Capital Floors were unenforceable based on their incongruity with the language of § 44F. Our focus, however, is not on enforcement of the bonds, but on the parties' contractual obligations under the general indemnity agreement (GIA) each signed. Even if the bonds themselves were unenforceable, and Colonial were not liable under them for the claims at issue here, the terms of the

GIA required Capital Floors and the Sevinors to indemnify Colonial for claims Colonial paid "in good faith under [its] belief that . . . [it] was or might be liable therefor[]" (emphases added). See Hartford Acc. & Indem. Co. v. Millis Roofing & Sheet Metal, Inc., 11 Mass. App. Ct. 998, 999-1000 (1981); United States Fid. & Guar. Co. v. Feibus, 15 F. Supp. 2d 579, 583, 584 (M.D. Pa. 1998) (considering similar language and concluding, "[s]uch language does not require that payment be made only in the face of actual liability under the bonds"), and cases cited.

The undisputed facts in the summary judgment record show that Colonial paid the claims under the belief that it was liable for them under the bonds: the claims were, to the extent that Colonial was able to determine, timely; the claimants appeared to have provided materials or supplies directly to Capital Floors; Capital Floors and the Sevinors were given notice of the claims and did not object; and Colonial had no actual knowledge of the terms of the general contract or subcontract bid.

As to whether that belief was held in "good faith," we note that here, Colonial was presented with facially valid claims against facially valid bonds, and that it investigated the facts surrounding the claims. The Sevinors failed to raise a triable issue, i.e., whether Colonial's failure to conduct a full legal

analysis of whether the bonds at issue comported with G. L. c. 269 amounted to bad faith. See Green v. Blue Cross Blue Shield, Inc., 47 Mass. App. Ct. 443, 447 (1999), quoting Murach v. Massachusetts Bonding & Ins. Co., 339 Mass. 184, 187 (1959) ("The insurer will not be held to prophesy"). A party may act in good faith by attempting to "discover the facts as to liability and damages upon which an intelligent decision may be based."[3] Green, supra, quoting Murach, supra. See Feibus, 15 F. Supp. 2d at 585 ("even gross negligence cannot support a finding of bad faith").

The same undisputed facts that support summary judgment in favor of Colonial on its claims against the Sevinors for breach of the GIA support summary judgment in Colonial's favor on the Sevinors' counterclaim for breach of that agreement. On those facts, and in the absence of a showing of Colonial's bad faith, the Sevinors have failed to demonstrate a genuine issue of material fact as to their counterclaim for breach of the implied covenants of good faith and fair dealing. See Uno Restaurants,

[3] We are aware that Colonial was responsible for issuing the bonds and acknowledge the Sevinors' argument that, particularly under those circumstances, Colonial should have recognized the need for bonds conforming to the requirements of § 44F. Even in the absence of any evidence that Capital Floors or the Sevinors asked for bonds on those terms, and in light of the complete lack of any objection to the bond terms or payments at any time before suit was filed in this case, we see no "bad faith" in Colonial's handling of the bonds at any point.

Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 385 (2004) (covenant of good faith and fair dealing does not create rights and duties not otherwise provided for in parties' contract; "purpose of the covenant is to guarantee that the parties remain faithful to the intended and agreed expectations of the parties in their performance"). The Sevinors also have failed to show a violation of G. L. c. 93A. See Wang Labs., Inc. v. Business Incentives, Inc., 398 Mass. 854, 858 (1986) ("A negligent unfair act or practice does not qualify for multiple damages" under G. L. c. 93A, § 11); Govoni & Sons Constr. Co. v. Mechanics Bank, 51 Mass. App. Ct. 35, 51 (2001) (mere negligence "by itself does not amount to a chapter 93A violation"). Colonial was entitled to summary judgment on those claims.

2. Attorney's fees. We discern no abuse of discretion in the judge's denial of the $13,017.55 in attorney's fees Colonial sought for Cetrulo & Capone, LLP's services. See Hyannis Anglers Club, Inc. v. Harris Warren Commercial Kitchens, LLC, 91 Mass. App. Ct. 555, 563 (2017). While under the GIA,[4] Colonial's documentation of those fees is sufficient to make a prima facie showing of "the fact and extent of the liability" for those

[4] Paragraph 5 of the GIA entitles Colonial to repayment for, among other things, court costs and attorney's fees sustained by Colonial "by reason of the failure of the [p]rincipal or any of the other [i]ndemnitors to perform or comply with the promises, covenants and conditions of [the GIA]," or in enforcing the GIA's terms.

amounts, the documentation does not establish the reasonableness of the fees. In the absence of evidence sufficient to allow the judge to determine whether the fees were reasonable, the judge was not required to award those fees. See Trustees of Tufts College v. Ramsdell, 28 Mass. App. Ct. 584, 585 (1990) ("Under Massachusetts law, a borrower may be liable for attorney's fees if the note expressly provides for them, but they are limited to an amount that is found to be fair and reasonable").

3. Prejudgment interest. "[P]rejudgment interest is to be calculated from the date of the breach or demand, if established." Starr v. Fordham, 420 Mass. 178, 194 (1995). The judge who assessed damages acknowledged that the terms of the GIA established that prejudgment interest began to accrue on any payment on the date on which the payment was made, but determined that, "as a matter of fairness," prejudgment interest should not accrue on the payments until the date on which the Sevinors became aware of them. "There can be no doubt that a judge has the discretion to adjust an award of interest where a litigant has been responsible for an unnecessary delay." Currier v. Malden Redev. Auth., 16 Mass. App. Ct. 906, 907 (1983). In light of the decade-long interval between the dates of the payments Colonial made on Capital Floors' bonds and the date of its demand to the Sevinors for indemnification, we

conclude that the judge properly exercised his discretion to adjust the amount of interest.

4. Appellate attorney's fees and costs. Colonial's brief includes a request for appellate attorney's fees and costs under the terms of the GIA.[5] As the contract between the parties provides for recovery of any fees and costs that Colonial sustains "in good faith" in enforcing the GIA, it is entitled to recover its fees and costs for this appeal, to the extent that they are reasonable. See Yorke Mgmt. v. Castro, 406 Mass. 17, 18-19 (1989).

Conclusion. We affirm the judgment entered August 8, 2017, and the orders denying the Sevinors' motions for reconsideration. We also affirm the amended judgment entered March 2, 2018, in favor of Colonial, including the assessment of attorney's fees and prejudgment interest. Colonial may submit a motion for appellate fees and costs "together with the necessary back-up material and details as to hours spent, precise nature of the work, and fees requested," id. at 20, within fourteen days of the date of this decision. The Sevinors may file a

[5] The Sevinors' brief did not address this issue.

response, if any, within fourteen days thereafter. See Fabre v. Walton, 441 Mass. 9, 10-11 (2004).

So ordered.

By the Court (Wolohojian, Kinder & Hand, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: July 16, 2019.

[6] The panelists are listed in order of seniority.